Supreme Court, U.S.
FILED

No. 091174 MAR 15 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH LAKE,

Petitioner,

v.

LANGDON D. NEAL; RICHARD A. COWEN; MARISEL A. HERNANDEZ; LANCE GOUGH; CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

NICHOLAS C. KEFALOS, P.C.
Counsel of Record
ADOLFO MONDRAGÓN
VERNOR MORAN, LLC
27 N. WACKER DRIVE, SUITE 2000
CHICAGO, IL 60606-2800
(312) 264-4460
nkefalos@vernormoran.com

Counsel for Petitioner

March 15, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The district court dismissed a claim based on the National Voter Registration Act[1] ("NVRA")and the Driver's Privacy Protection Act[2] ("DPPA")that was brought against certain public officials and the public body they are members of to end a policy and practice of unlimited and unrestricted public disclosure of personal information from voter registration and motor vehicle records for failure to state a claim, subject to Fed. Civ. P. 12(b)(6). The district court also dismissed the action brought against the individual members of the public body, in their official capacities, based on Title VII case law, notwithstanding the fact that the lawsuit's claim was premised on the NVRA and the DPPA. The Seventh Circuit affirmed, but only on the ground that a State motor vehicle driver's application and a voter registration application made simultaneously, on the same sheet of paper, and in person at a department of motor vehicle pursuant to the NVRA does not pertain to a motor vehicle record under the DPPA and, as such, there is no prohibition against a policy, practice and custom of publicly disclosing social security numbers, names, former names, dates of birth, sex, addresses, and telephone numbers, without the consent of individuals to whom the information pertains, under the DPPA. The questions presented are:

1. Whether the NVRA's plain language clearly and

---

[1] The National Voter Registration Act is found at 42 U.S.C. 1973-gg-1973-gg-10.

[2] The Driver's Privacy Protection Act is found at 18 U.S.C. 2721-2725.

unambiguously mandates that a State motor vehicle driver's license application and a voter registration application made simultaneously, on the same sheet of paper, and in person at a department of motor vehicle serve as one and the same.

2. Whether a person whose personal information that is knowingly disclosed to the general public as part of a custom, policy and practice of a public body can bring suit under the DPPA against the individual members of that public body in their official capacities when that public body is also a named party.

PARTIES TO THE PROCEEDING

Petitioner in this Court, Plaintiff-Appellant below, is Joseph Lake, an individual.

Respondents in this Court, Defendants-Appellees below, are Langdon Neal, in his official capacity as Chairman, Richard Cowen, in his official capacity as Secretary, Marisel A. Hernandez, in her official capacity as Commissioner, Lance Gough, in his official capacity as Executive Director, and the Chicago Board of Election Commissioners, the public body that the individuals herein named are members and director, respectively.

CORPORATE DISCLOSURE STATEMENT

No corporations are parties and there are no parent companies or publicly held companies owning any corporation's stock.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding iii

Corporate Disclosure Statement iii

Table of Contents iv

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Petition 5

I. The Seventh Circuit's Application of the "Plain Meaning" Standard Conflicts with the Decisions of this Court. 6

A. Congress Clearly Intended Voter Registration for Federal Elections Filled-Out Simultaneously and On the Same Sheet of Paper with aMotor Vehicle Driver's License Applications to Serve as One and the Same. 8

B. The Question Presented has a Profound Implication for Privacy Rights and Personal Security. 11

II. The District Court's Conclusion that Actions against Public Officials are Redundant under the DPPA Disregards the Decision of this Court in *Kentucky v. Graham*, 473 U.S. 159 (1985). 13

Conclusion 14

Appendix

Appendix A: U.S. Court of Appeals for the Seventh Circuit Opinion, dated 11/6/09 . . . . . 1a

Appendix B: U.S. District Court for the Northern District of Illinois Eastern Division Memorandum Opinion and Order, dated 9/29/08 . . . . . 7a

Appendix C: U.S. District Court for the Northern District of Illinois Eastern Division Judgment, dated 9/29/08 . . . . . 14a

Appendix D: U.S. Court of Appeals for the Seventh Circuit Order Denying Rehearing and Rehearing En Banc, dated 12/15/09 . . . . . 16a

Appendix E: Statutory Provisions Involved . 18a

TABLE OF AUTHORITIES

CASES

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000) 6

John Doe # 1, et al., v. Sam Reed, Washington Secretary of State, et al., petition for cert. granted (U.S. Jan 15, 2010) (No. 09-559) 12

Kentucky v. Graham,
473 U.S. 159 (1985) 13

Lamie v. United States Trustee,
540 U.S. 526 (2004) 6

Margan v. Niles,
250 F. Supp. 2d 63 (N.D.N.Y. 2003) 11, 12

Microsoft Corp. v. AT&T Corp.,
550 U.S. 437 (2007) 8

Pub. Citizen v. U.S. Dep't. of Justice,
491 U.S. 440 (1989) 6

Reno v. Koray,
515 U.S. 50 (1995) 8

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 8

Sierra Club v. Train,
557 F.2d 485 (5th Cir. 1977) 9

United States v. Locke,
471 U.S. 84 (1985) 7

United States v. Miscellaneous Firearms, Explosives, Destructive Devices and Ammunition,
376 F.3d 709 (7th Cir. 2004) 7

Welsh v. Boy Scouts of Am.,
993 F.2d 1267 (7th Cir. 1993) 8

STATUTES

18 U.S.C. §§ 2721-2721(a)(1) 1
18 U.S.C. §§ 2721-2725 ..... i, 2
18 U.S.C. § 2721(b) 3
18 U.S.C. §§ 2721(b)(1)-(b)(14) 3
18 U.S.C. § 2721(c) 3
18 U.S.C. § 2724(a) 2
18 U.S.C. §§ 2725(1)-2725(3) 2
28 U.S.C. 1254(1) 1
42 U.S.C. § 1973-gg-1973-gg-10 ..... i, 2
42 U.S.C. § 1973gg-1973gg-2(a)(1) 1
42 U.S.C. § 1973gg-2(a)(1) 2, 8
42 U.S.C. § 1973gg-3-1973gg-3(a)(1) 1
42 U.S.C. § 1973gg-3(a)(1) 3, 7, 9
42 U.S.C. § 1973gg-3(c)(1)-1973gg-3(c)(2)(A) 1
42 U.S.C. § 1973gg-3(c)(1) 10
42 U.S.C. § 1973gg-3(c)(2) 10
42 U.S.C. § 1973gg-3(c)(2)(A) 10
42 U.S.C. § 1973gg-3(d) 1
42 U.S.C. § 1973gg-3(d)(1) 3
42 U.S.C. § 1973gg(b)(1)-1973gg(b)(2) 1

RULES

Fed. R. Civ. P. 12(b)(6) ..... i, 5

OTHER

C. SANDS, SUTHERLAND'S STATUTORY CONSTRUCTION § 25.04 (4th ed. 1973) 9

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006) 8, 9, 10

Joseph Lake respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 585 F. 3d 1059 and is reproduced in the Appendix A herein at 1a. The order of the court of appeals denying rehearing and rehearing en banc is not reported and is reproduced in the Appendix D at 16a. The decision of the U.S. District Court for the Northern District of Illinois is not officially reported but is available at 2008 U.S. Dist. LEXIS 75090 and is reproduced in the Appendix B at 7a.

JURISDICTION

The judgment of the court of appeals was issued on November 6, 2009. Pet. App. A at 1a. Petitioner's timely petition for rehearing and rehearing en banc was denied on December 15, 2009. Pet. App. D at 16a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following are appended: National Voter Registration Act of 1993 at 42 U.S.C. 1973gg(b)(1)-1973gg(b)(2)(Pet. App. E at 18a.); 42 U.S.C. 1973gg-1973gg-2(a)(1)(Pet. App. E at 18a-19a.); 42 U.S.C. 1973gg-3-1973gg-3(a)(1)(Pet. App. E at 19a.); 42 U.S.C. 1973gg-3(c)(1)-1973gg-3(c)(2)(A)(Pet. App. E at 19a-20a.); 42 U.S.C. 1973gg-3(d)(Pet. App. E at 20a.); and, Driver's Privacy Protection Act of 1994 at 18 U.S.C. 2721-2721(a)(1)(Pet. App. E at 20a-21a.); 18 U.S.C.

2725(1)-2725(3)(Pet. App. E at 21a-22a.); and, 18 U.S.C. 2724(a)(Pet. App. E at 22a.).

STATEMENT OF THE CASE

On June 12, 2008, Petitioner filed a second amended complaint under the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721-2725, seeking to end the Respondents' policy, practice, and custom of publicly disclosing motor vehicle information that identifies an individual and which is received directly from the Illinois Secretary of State pursuant to the mandates of the National Voter Registration Act ("NVRA"), 42 U.S.C. 1973gg-1973gg-10, without the consent of the individual to whom the information pertains and for a purpose not permitted under the DPPA. Through this policy, practice, and custom, Petitioner alleged that Respondents disclosed personal information from Petitioner's motor vehicle record without Petitioner's consent and for a purpose not permitted under the DPPA. Petitioner claimed in his complaint that Respondents' systemic public disclosure of motor vehicle information is unlawful and threatens the public safety and financial welfare of numerous registered voters, including Petitioner.

The amended complaint relies upon the NVRA, which requires that the Illinois Secretary of State establish procedures to register to vote in elections for Federal office by application made simultaneously with an application for a motor vehicle driver's license. 42 U.S.C. § 1973gg-2(a)(1). Indeed, the NVRA provides, "Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application

for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." 42 U.S.C. § 1973gg-3(a)(1). Furthermore, the NVRA requires that the Illinois Secretary of State transmit a completed voter registration portion of an application for a State motor vehicle driver's license accepted at a State motor vehicle authority to Respondents within 10 days after the acceptance. 42 U.S.C. § 1973gg-3(d)(1). In this case, Petitioner alleged that Respondents receive the completed voter registration portions of the actual forms that individuals fill out by hand when applying for or renewing their motor vehicle driver's license in person at a department of motor vehicle directly from the Illinois Secretary of State pursuant to the mandates of the NVRA, including the completed voter registration portion of the application for a motor vehicle driver's license that Petitioner filled out in person at an Illinois State department of motor vehicle office on or about July 2, 1998.

The DPPA mandates that the Board, which is an authorized recipient of motor vehicle records pursuant to the NVRA, disclose personal information from motor vehicle records for a few limited purposes, 18 U.S.C. § 2721(b), and permits the Board to disclose personal information from motor vehicle records for various enumerated purposes, 18 U.S.C. §§ 2721(b)(1)-(b)(14), none of which are at issue here. Outside of those exceptions, the DPPA prohibits authorized recipients of motor vehicle records, such as Respondents, from reselling and re-disclosing personal information from motor vehicle records. 18 U.S.C. § 2721(c).

In this case, Petitioner alleged that the Respondents systemically discloses to the public un-

redacted facsimiles of the completed voter registration portions of the applications for a State motor vehicle driver's license accepted at a State motor vehicle authority, without the consent of the individual to whom the information pertains and for a purpose not permitted under the DPPA. Those un-redacted motor vehicle records contain social security numbers, names, former names, dates of birth, sex, addresses, and telephone numbers that can make it easy for stalkers, harassers, and would-be criminals to physically and, or, financially harm registered voters. In April of 2007, the Respondents disclosed an un-redacted facsimile of the completed voter registration portion of the actual form that Petitioner filled out by hand when he applied for his motor vehicle driver's license in person at a department of motor vehicles on or about July 2, 1998, without Petitioner's consent and for a purpose not permitted under the DPPA. This disclosure was part of a policy, practice, and custom and not a one-time fluke. Indeed, certain individuals had gained access to the un-redacted facsimiles of the voter registration forms that Respondents receive directly from the Illinois Secretary of State on many previous occasions over the course of at least ten years. The Respondents' policy, practice, and custom of publicly disclosing motor vehicle records that identify an individual, however, poses a legitimate threat to the personal safety and financial welfare of registered voters; In particular, to public figures and community activists such as Petitioner.

On September 29, 2008, the district court dismissed the action against the individual members of Respondent public body finding under Title VII case law that a lawsuit against the individual members of a public body when that public body is also named in

the lawsuit is redundant. (Pet. App. B at 10a.) Further, the district court held that Petitioner failed to state a claim against the named Respondent public body for which relief could be granted under Fed. R. Civ. P. 12(b)(6)because the district court found that information contained in a State motor vehicle record transformed into something other than a motor vehicle record because Petitioner chose to register to vote on the same application as his State motor vehicle license application and the information was then released by the State to Respondents. (Pet. App. B at 11a-12a.)

On November 6, 2009, the Seventh Circuit issued its opinion finding only that a State motor vehicle driver's application and a voter registration application made simultaneously, on the same sheet of paper, and in person at a department of motor vehicle pursuant to the NVRA does not pertain to a motor vehicle record under the DPPA.(Pet. App. A at 4a-5a.) On December 15, 2009, the Seventh Circuit denied Petitioner's timely request for rehearing and rehearing en banc. Pet. App. D at 17a.

REASONS FOR GRANTING THE PETITION

While this case involves dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), at the heart lies whether Respondents' policy, practice, and custom of disclosing to the public un-redacted facsimiles of the completed voter registration portions of the actual forms that individuals fill out by hand when applying for or renewing their motor vehicle driver's license in persons at a department of motor vehicle, which contain social security numbers, names, former names, dates of birth, sex, addresses, and telephone numbers, without the consent of the

individuals to whom the information pertains and for a purpose not permitted under the DPPA, as a matter of law, is protected from indiscriminant disclosure to the public at large under the DPPA. (Pet. App. A at 4a-5a.)

I. The Seventh Circuit's Application of the "Plain Meaning" Standard Conflicts with the Decisions of this Court.

"Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Hence, adherence to the plain meaning rule is not simply a matter of judicial craftsmanship. To the contrary, faithfulness to the words Congress has used in enacting a statute promotes respect for Congress as the principle source of positive law in a democratic society. *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004)("We should prefer the plain meaning since that approach respects the words of Congress."); *Pub. Citizen v. U.S. Dep't. of Justice*, 491 U.S. 440, 470-71 (1989)(Kennedy, J., concurring)(recognizing that departure from the plain meaning rule, except in limited circumstances where completely necessary, would intrude upon the lawmaking powers of Congress). Furthermore, allegiance to the plain meaning rule also disciplines courts to avoid making policy choices where the intent of Congress is expressed in the language of the statute. *Lamie*, 540 U.S. at 538 (stating that the "unwillingness to soften the import of Congress' chosen words ... results from 'deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a

bill.'")(quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)(internal citations omitted)).

In this case, the plain language of the NVRA clearly and unambiguously indicates that the completed form that the State forwards to the Respondents is a part of a whole and uniform motor vehicle driver's application. The opinion of the court of appeals does not mention this. Instead, the Seventh Circuit does great violence to the NVRA and DPPA statutory framework by not reading language from the NVRA to inform its reading of the DPPA in this case.

Particularly, there is no mention in the Seventh Circuit's opinion concerning the language in Section 1973gg-3 of the NVRA, 42 U.S.C. § 1973gg-3(a)(1), which provides that each State motor vehicle driver's license application (including any renewal application) shall serve as an application for voter registration. Instead, the Seventh Circuit cavalierly dismisses Petitioner's reading of the statute's plain language without articulating why the voter registration form, which is filled out simultaneously and on the same sheet of paper with the motor vehicle driver's license application are not one and the same, and the court of appeals does so without providing a "plain meaning" approach of ascertaining legislative intent. The rules of statutory interpretation, however, do not allow interpretation by fiat.

The cardinal rule of statutory interpretation provides that courts "must first look to the language of the statute and assume that its plain meaning accurately expresses the legislative purpose." *United States v. Miscellaneous Firearms, Explosives, Destructive Devices and Ammunition*, 376 F.3d 709,

712 (7th Cir. 2004). In determining whether the meaning of statutory language is plain or ambiguous, courts look to the specific language at issue, the context in which the language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Courts should interpret statutes "in accordance with [their] ordinary or natural meaning, *Microsoft Corp. v. AT&T Corp.*,550 U.S. 437, 449 (2007)(quotation marks omitted), but because statutes are to be read and interpreted as a whole, the plain and ordinary meaning of a term must be informed by context and the overall statutory scheme. *Reno v. Koray*, 515 U.S. 50, 56 (1995) ("it is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'"). Furthermore, courts must not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1272 (7th Cir. 1993).

A. Congress Clearly Intended Voter Registration for Federal Elections Filled-Out Simultaneously and On the Same Sheet of Paper with a Motor Vehicle Driver's License Applications to Serve as One and the Same.

The NVRA requires, with regard to federal elections, that states must adopt procedures that allow eligible persons to register to vote by application made "simultaneously" with an application for a motor vehicle driver's license. 42 U.S.C. § 1973gg-2(a)(1). The definition of the adjective "simultaneous" is "happening, existing, or done at the same time." THE

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1623 (4th ed. 2006). The NVRA further provides that, "Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law **shall serve as** an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." 42 U.S.C. § 1973gg-3(a)(1). (Emphasis added). The use of the word "shall" generally indicates a mandatory intent unless a convincing argument to the contrary is made. *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977) (*citing*, C. SANDS, SUTHERLAND'S STATUTORY CONSTRUCTION § 25.04 (4th ed. 1973)). The court of appeals in this case has failed to make any explanation to the contrary. Moreover, the definition of the intransitive verb "serve" is "to be of service or use; function" and "to act in a particular capacity." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1591 (4th ed. 2006). A simple substitution of the word "serve" with its definition makes it crystal clear that Congress intended a State motor vehicle driver's license application (including any renewal application) "to be of service or use" or "to function or act" as an application for voter registration. Consequently, the NVRA mandates that a State motor vehicle driver's license application and a voter registration application made at the same time, on the same sheet of paper, and in person at a department of motor vehicle act or function as one and the same.

This notion of one uniform application is further supported by other references in the statute. For instance, the NVRA provides that, "Each State shall include a voter registration application form for

elections for Federal office **as part of** an application for a State motor vehicle driver's license." 42 U.S.C. § 1973gg-3(c)(1). (Emphasis added). The definition of the noun "part" is "a portion, division, piece, or segment of a whole." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1280 (4th ed. 2006). Similarly, the NVRA refers to a voter registration application as a "**portion of** an application for a State motor vehicle driver's license." 42 U.S.C. § 1973gg-3(c)(2). (Emphasis added). The definition of the noun "portion" is "a section or quantity within a larger thing; a part of a whole." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1368 (4th ed. 2006).

Furthermore, the NVRA provides that the voter registration application portion may not require any information that duplicates information required in the driver's license portion of the form, 42 U.S.C. § 1973gg-3(c)(2)(A), indicating that once information is entered in the driver's license application portion of the document it is for all purposes also entered in the voter registration application portion of the document. In other words, it's unnecessary to repeat information already provided in portion "A" because both portion "A" and "B" are sections within a larger thing; *i.e.*, they are a part of a whole record. Consequently, the overall statutory scheme of the NVRA clearly and unambiguously indicates that there is but one complete and uniform driver's license application.

The opinion of the court of appeals ignores Congressional intent that the NVRA is to be read together with the DPPA. Instead, the Seventh Circuit dwells on only the DPPA and makes its own policy preference doing great violence to the statutory

scheme. Namely, without giving plain meaning to the language expressly chosen by Congress in enacting the NVRA, the Seventh Circuit has given the NVRA no effect and the court of appeals thereby reads the DPPA outside of its statutory framework, which can only be read in conjunction with and informed by the NVRA.

B. The Question Presented has a Profound Implication for Privacy Rights and Personal Security.

The Congress enacted the DPPA as part of the Violent Crime Control and Law Enforcement Act. *Margan v. Niles*, 250 F. Supp. 2d 63, 68 (N.D.N.Y. 2003). The DPPA was part of crime fighting legislation enacted in response to the murder of a young woman in Los Angeles, California, in 1989. *Margan*, 250 F. Supp. 2d at 68. Rebecca Schaeffer was an actress who starred on a television show *My Sister Sam* in the late 1980s. *Margan*, 250 F. Supp. 2d at 68. One of Schaeffer's "fans," Robert Bardo, retained a private investigator who recorded Schaeffer's license plate number. *Margan*, 250 F. Supp. 2d at 68. The investigator then went to the California State Department of Motor Vehicles where, for a nominal fee, he was able to obtain Ms. Schaeffer's home address. *Margan*, 250 F. Supp. 2d at 68. With the knowledge of Schaeffer's home address, Bardo went to her home and murdered her. *Margan*, 250 F. Supp. 2d at 68. Following this incident, several members of Congress sought to prevent state motor vehicle departments from freely providing personal information obtained from motor vehicle records. *Margan*, 250 F. Supp. 2d at 68. Through the DPPA, Congress intended to prevent stalkers, harassers, would-be criminals, and other unauthorized

individuals from obtaining and using personal information from motor vehicle records. *Margan*, 250 F. Supp. 2d at 68.

But if the court of appeals decision is left to stand then everyone who fills out a State motor vehicle driver's application and a voter registration application, simultaneously, on the same sheet of paper, and in person at a department of motor vehicle pursuant to the NVRA does not have any protection under the DPPA from having their information released. This is contrary to the intent of Congress in enacting the NVRA and the DPPA. Indeed, Congress wanted people to register to vote while getting a driver's license, all the while, being safe from having their personal information given out to the general public; not to create a disincentive from registering to vote. If the decision of the court of appeals is left to stand then there would be no reason to do both at the same time if one would have less protection by doing both at the same time rather than registering to vote and applying for a driver's license, separately, and in different places.

Further, this Court recently granted *certiorari* in the case of *John Doe # 1, et al., v. Sam Reed, Washington Secretary of State, et al.*, U.S. Sup Ct. Docket No. 09-559, which involves a similar issue as in this case. Namely, *Doe # 1* concerns the public disclosure of personal information of referendum petition signers. As such, if the Court is inclined to recognize or enforce a right to protect the dissemination of a voter's personal information to the public based upon the First Amendment to the U.S. Constitution then surely this Court must grant certiorari in this case to decide the narrow issue of

whether a State motor vehicle driver's application and a voter registration application made simultaneously, on the same sheet of paper, and in person at a department of motor vehicle pursuant to the NVRA pertains to a motor vehicle record under the DPPA.

II. The District Court's Conclusion that Actions against Public Officials are Redundant under the DPPA Disregards the Decision of this Court in *Kentucky v. Graham*, 473 U.S. 159 (1985).

In *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), this Court stated "that suits against municipal employees and officials in their official capacities are redundant and unnecessary when the municipality is also a named defendant." However, this Court expressly limited its holding, by its own terms, to suits brought under Section 1983, and the holding in *Graham* does not apply to "suits brought under any other provision of federal law." *Graham*, 473 U.S. at 162 n.2. Petitioner's second amended complaint is based on the DPPA, which gives him an express right of action against individuals, and not on Section 1983. Consequently, Petitioner can bring suit against the individual members and director of a public body in their official capacities despite the fact that the public body is also a named defendant.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted

Nicholas C. Kefalos, P.C.
Counsel of Record
Adolfo Mondragón
VERNOR MORAN, LLC
27 North Wacker Drive, Suite 2000
Chicago, Illinois 60606-2800
(312) 264-4460
(312) 264-4461 (fax)

APPENDIX

TABLE OF CONTENTS

Appendix A:	U.S. Court of Appeals for the Seventh Circuit Opinion, dated 11/6/09	1a
Appendix B:	U.S. District Court for the Northern District of Illinois Eastern Division Memorandum Opinion and Order, dated 9/29/08	7a
Appendix C:	U.S. District Court for the Northern District of Illinois Eastern Division Judgment, dated 9/29/08	14a
Appendix D:	U.S. Court of Appeals for the Seventh Circuit Order Denying Rehearing and Rehearing En Banc, dated 12/15/09	16a
Appendix E:	Statutory Provisions Involved	18a

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 08-3765

[Filed November 6, 2009]

JOSEPH LAKE, individually and on behalf of all persons similarly situated,
Plaintiff-Appellant,

v.

LANGDON D. NEAL, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 07 C 2742—**Robert W. Gettleman,** *Judge.*

ARGUED SEPTEMBER 14, 2009—
DECIDED NOVEMBER 6, 2009

Before EASTERBROOK, *Chief Judge*, and BAUER and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* The *Duck Test* holds that if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck. Joseph Lake, the plaintiff in

this suit, flunks the *Duck Test*. He says, in effect, that if it walks like a duck, swims like a duck, and quacks like a duck, it sure as heck isn't a duck.

The crux of Lake's argument in this appeal is that a voter registration form is actually a motor vehicle record. He argues that the Chicago Board of Election Commissioners (Board) violated the Driver's Privacy Protection Act (DPPA)[1]—which regulates motor vehicle records—by disclosing personal information it obtains from voter registration records that were completed at an office of the Illinois Department of Motor Vehicles (DMV). After a parallel claim in state court was dismissed with prejudice, Lake instituted this class action suit against the Board. Recognizing a fatal flaw in Lake's argument, the district court granted the defendants' motion to dismiss for failure to state a claim.

Because this case comes to us on an appeal from an order granting a motion to dismiss for failure to state a claim, we accept as true all well-pleaded facts alleged, drawing all possible inferences in the plaintiff's favor. *Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 782 (7th Cir. 1999). Here are the facts.

In 1998, Lake applied for a driver's licence at an office of the Illinois DMV. Pursuant to the National Voter Registration Act (NVRA),[2] he exercised an option to register to vote at the same time. He filled out and

---

[1] 18 U.S.C. §§ 2721-25.

[2] 42 U.S.C. § 1973.

submitted a voter registration form, which was attached to the driver's license application. The completed voter registration form was transmitted to the Board. In 2007, a fellow named Peter Zelchenko acquired Lake's personal information—he says it was his name, date of birth, sex, address, former address, phone number, and social security number[3]—by simply asking the Board for it. Zelchenko informed Lake that he acquired his personal information from the Board.

Lake raises two issues on appeal, but we need only discuss one: Did his complaint state a cause of action under the DPPA?

The district court dismissed the complaint for failure to state a claim after it determined that a voter registration form filled out at the DMV under the NVRA is not a motor vehicle record under the DPPA. We review grants of motions for failure to state a claim *de novo*. *Hickey v. O'Bannon*, 287 F.3d 656, 657 (7th Cir. 2002).

A bit of background on the two statutes is necessary. The DPPA regulates the ways a DMV can disclose information. Congress passed the DPPA in response to safety and privacy concerns stemming from the ready availability of personal information contained in state motor vehicle records. The most prominent example of the realization of these concerns was the 1989 murder of actress Rebecca Schaeffer, star

---

[3] Although we are required to accept as true the facts as pled, we have a hard time believing that the Board, in this day and age, would intentionally release a registered voter's social security number.

of the television series "My Sister Sam." *See* 137 Cong. Rec. 27, 327 (1993). An obsessed fan stalked and killed the actress, in her own apartment, after he obtained her unlisted address from the California DMV. The second statute, the NVRA, allows eligible citizens to register to vote while applying for a driver's license. Congress passed the NVRA to (1) make it easier to register to vote and (2) to help protect the integrity of the process by ensuring that accurate voter registration rolls are maintained.

The basis for plaintiff's claim is § 2724 of the DPPA, which creates a private cause of action against "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter . . . ." The DPPA defines a motor vehicle record as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles[.]" The issue for us is whether the voter registration form that Lake filled out at the DMV is a "motor vehicle record" under the DPPA. It qualifies as such only if it "pertains" to one of the documents mentioned in the statute.

The plain language of both statutes makes it clear that a voter registration form filled out pursuant to the NVRA does not "pertain" to any of the listed DMV documents. The dictionary tells us that "pertain" means "to belong as a part, member, accessory, or product."[4] The voter registration form, which is filled out separately and at the applicant's option, is not a

---

[4] Merriam-Webster's Collegiate Dictionary (11th ed. 2004).

part, member, accessory, or product of a motor vehicle operator's permit. Other than the fact that it is filled out simultaneously with a driver's license application, the voter form has nothing to do with, nor does it "pertain" to, a motor vehicle operator's permit.

Finally, we would not accept Lake's argument even if a literal interpretation of the DPPA would seem to compel it because that would "lead to an absurd result . . . ." *Castellon-Contreras v. INS*, 45 F.3d 149, 153 (7th Cir. 1995) (citing *Born v. United States*, 498 U.S. 1126 (1991)). The Board receives voter registration forms from a variety of sources. The Illinois DMV, pursuant to the NVRA, is one such source. All voter registration forms contain the same basic information, which the Board must—according to Illinois state law—make available to the public. *See* 10 Ill. Comp. Stat. Ann. 5/6-35 (2009). Accepting Lake's argument would lead to an absurd situation: the Board violates federal law when it discloses the personal information it receives from the DMV pursuant to the NVRA but does not violate federal law when it discloses the same personal information it receives from other sources. This result also likely contravenes the purpose of the NVRA, which is to increase voter registration in federal elections. If it is against federal law for the Board to disclose the voter information it receives from the DMV, but against state law to not make it publicly available, the Board will likely be forced to stop accepting voter registration forms received from the DMV. That would nullify an important purpose of the NVRA.

Since a voter registration form filled out at the DMV is not a motor vehicle record under the DPPA, the Board could not have violated the DPPA by

disclosing Lake's personal information to the extent that it did.

Accordingly, the judgment of the district court is AFFIRMED.

11-6-09

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 07 C 2742

[Filed September 29, 2008]

JOSEPH LAKE, individually and on behalf of all persons similarly situated,

Plaintiff,

v.

LANDGON NEAL, Chairman; RICHARD COWEN, Secretary; MARISEL A. HERNANDEZ, Commissioner; LANCE GOUGH, Executive Director; MEMBERS AND DIRECTORS, respectively, of the CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants.

Judge Robert W. Gettleman

MEMORANDUM OPINION AND ORDER

Plaintiff Joseph Lake filed a second amended complaint alleging a violation of the Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-2725 (2007), against the Chicago Board of Election Commissioners (the "Board") and its members, Richard Cowen, Lance Gough, Marisel Hernandez, and Langdon Neal ("Board Members") in their official capacities. Plaintiff's original complaint alleged a civil rights action under 42 U.S.C. § 1983 for violations of the DPPA, the National Voter Registration Act of 1993 ("NVRA"), and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. All that remains of the original complaint is one count alleging a violation of the DPPA. Defendants move to dismiss the action for failure to state a claim upon which relief may be granted pursuant to Fed. Civ. P. 12(b)(6). For the reasons discussed below, the court grants defendants' motion.

FACTS[1]

On or about July 2, 1998, plaintiff applied for a driver's license through the Illinois State Department of Motor Vehicles. Pursuant to the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg-1973gg-10, plaintiff checked a box, which simultaneously registered him to vote in the state of Illinois by sending his information to the Board.

---

[1] These facts are taken from plaintiff's complaint and are presumed true for purposes of this motion to dismiss. R.E. Davis Chemical Corp. v. Nalco, 757 F.Supp. 1499, 1505 (N.D. Ill. 1990)

Congress passed the NVRA to increase voter participation in federal elections by making it easier to register to vote. 42 U.S.C. § 1973gg.

In April of 2007, Peter Zelchenko went to the Board to access personal information about plaintiff from plaintiff's voter registration information. Zelchenko had done this on many prior occasions to gain information about voters. The personal information about plaintiff that Zelchenko acquired included his name, date of birth, sex, address, former address, phone number, and social security number. All of this was done without the plaintiff's consent. Zelchenko then used the information to contact plaintiff.

On May 16, 2007, upon learning that Zelchenko obtained his personal information from the Board, the plaintiff instituted this putative class action suit against the individual members of the Board and the Board itself, as well as the Illinois Secretary of State Jesse White. Plaintiff voluntarily dismissed the claim against the Secretary of State.

Before plaintiff brought this action, Zelchenko had filed a putative class action suit in Illinois state court alleging that the Board unlawfully disclosed his personal information. Plaintiff was a member of the putative state class. The instant action was stayed pending resolution of the state court action. The state court action was ultimately dismissed with prejudice. Plaintiff filed a second amended complaint in the instant action. Defendants now move to dismiss plaintiff's action pursuant to Fed. R. Civ. P. 12(b)(6).

DISCUSSION

"A suit against individuals in their official capacity working for a local government unit is essentially a suit against the local government unit." Bruce v. South Stickney Sanitary Dist. 2001 WL 968726 at *2 (2001). Therefore, the actions against the individual members of the Board are no different that the action against the Board itself and are dismissed.

In 1994, Congress passed the DPPA in order to protect the privacy of individuals whose information is registered with their local Department of Motor Vehicles. The DPPA provides a private right of action: "[A] person who knowingly obtains, discloses or uses information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States District Court." 18 U.S.C. § 2724(a). Plaintiff alleges that defendants improperly disclosed his personal information in violation of the DPPA.

The NVRA provides that a voter can register simultaneously while receiving or renewing a driver's license. "The purposes of this subchapter are -- (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). The NVRA allows a voter to circumvent the process of going directly to the Board to register to vote. The statute provides that, "Each State shall include a voter registration application form for elections for Federal office as *part of* an application for a State motor vehicle driver's license. "42 U.S.C. § 1973gg-3(c)(1) (Emphasis added). Essentially, the DMV takes a

portion of the driver's license application and releases that information to the Board to register the applicant to vote. The information that is released to the Board then becomes a voting record and is wholly independent from a motor vehicle record.

The NVRA states that, "Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law *shall serve as* an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." (Emphasis added) 42 U.S.C. §1973gg-3(1). Plaintiff attempts to define "shall serve as" to mean "to function" or "to act in a particular capacity." Plaintiff argues that a driver's license application used as a voter registration application means that they were intended to be one and the same. The court disagrees. No court has interpreted the DPPA to apply to anything that had such little relation to a Department of Motor Vehicles, and this court declines to do so.

The DPPA clearly defines a motor vehicle record as "any record that pertains to a motor vehicle's operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. § 2725(1). The information that the Board disclosed to Zelchekno meets none of those criteria. Had the plaintiff registered to vote in the normal course, he would not have been entitled to protection based on the DPPA. The only difference in the instant case is that plaintiff chose to register to vote while applying for a driver's license. The information is identical. The DMV

disclosed no more information than was necessary to complete a voter registration form.

In O'Brien v. Quad Six 219 F. Supp. 2d 933, 934, (N.D. Ill. 2002), the court explained Congress's reasoning in passing the DPPA. The statute "seeks to control dissemination of information collected using the coercive power of the state." Id. at 935. The court explained that disclosing information to the department of motor vehicles when applying for a driver's license or permit is "significantly less voluntary" than disclosing information to private businesses or organizations. Id at 934. In the instant case plaintiff repeatedly overlooks the fact that he voluntarily disclosed his personal information to the Board by registering to vote. In doing so he transferred information to the Board to create an entirely new voting record that was, from then on, under the control of the Board. After that, he was not entitled to protection under the DPPA with respect to the information stored and retained by the Board as a voter registration record.

In Mattivi v Russell 2002 WL 31949898 at *2 (D. Colo. Aug 2, 2002), the court decided whether a report obtained from the Colorado State Patrol was a "motor vehicle record" under the DPPA. The court rejected the plaintiff's argument and concluded that the Colorado State Patrol was an agent of the Department of Motor Vehicles, and that the police report was not a motor vehicle record because it was not "issued by a department of motor vehicles." Id at *3.

In the instant case, plaintiff does not even allege that the Board was acting as an agent of the DMV. He is attempting to argue that the voter registration

application is a motor vehicle record. This, as has already been shown, is incorrect. Quite simply, Congress chose to specifically make the DPPA apply to records coming from the DMV and pertaining to a motor vehicle license or permit. Voter registration records are neither.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss for failure to state a claim is granted pursuant to Fed. R. Civ. P. 12 (b)(6).

ENTER: September 29, 2008

/s/Robert W. Gettleman
Robert W. Gettleman
United States District Judge

APPENDIX C

AO 450(Rev. 5/85)Judgment in a Civil Case

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

Case Number 07 C 2742

[Filed September 29, 2008]

Joseph Lake, etc.	)
	)
v	)
	)
Landgon Neal, et al	)
	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion to dismiss the second amended

complaint for failure to state a claim is granted pursuant to Fed. R. Civ. P. 12(b)(6).

Michael W. Dobbins,
Clerk of Court

Date: September 29, 2008 /s/ George Schwemin
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 07-cv-2742

[Filed December 15, 2009]

JOSEPH LAKE,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
LANGDON D. NEAL, et al.,	)
Defendants-Appellees.	)
	)

Before

FRANK H. EASTERBROOK, *Chief Judge*
WILLIAM J. BAUER, *Circuit Judge*
TERENCE T. EVANS, *Circuit Judge*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Robert W. Gettleman, *Judge*.

ORDER

On November 20, 2009, the plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. All the judges on the panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

The National Voter Registration Act of 1993, 42 U.S.C. 1973gg-1973gg-10, but specifically the following provisions:

> (b) Purposes. The purposes of this Act are—
>
> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office[.]

42 U.S.C. 1973gg(b)(1)-1973gg(b)(2).

* * *

National procedures for voter registration for elections for Federal office

> (a) In general. Except as provided in subsection (b), notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office—

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 5[1]

42 U.S.C. 1973gg-2-1973gg-2(a)(1).

* * *

Simultaneous application for voter registration and application for motor vehicle driver's license

(a) In general.

(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.

42 U.S.C. 1973gg3-1973gg3(a)(1).

* * *

(1) Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license.

---

[1] 42 U.S.C. 1973gg-3 (2006).

(2) The voter registration application portion of an application for a State motor vehicle driver's license—

(A) may not require any information that duplicates information required in the driver's license portion of the form[.]

42 U.S.C. 1973gg-3(c)(1)-1973gg-(3)(c)(2)(A).

* * *

(d) Change of address. Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

42 U.S.C. 1973gg-3(d).

* * *

The Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725, enacted as part of the Violent Crime Control and Law Enforcement Act, but specifically the following provisions:

Prohibition on release and use of certain personal information from State motor vehicle records

> (a) In general. A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:
>
> (1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section[.]

18 U.S.C. 2721-2721(a)(1).

* * *

> (1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;
>
> (2) "person" means an individual, organization or entity, but does not include a State or agency thereof;
>
> (3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information

on vehicular accidents, driving violations, and driver's status.[.]

18 U.S.C. 2725(1)-2725(3).

* * *

(a) Cause of action. A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter [18 USCS §§ 2721, et seq.] shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

18 U.S.C. 2724(a).